

Agency Acquisition Regulation (EPAAR) coverage on Information Resources Management (IRM) by providing electronic access to EPA IRM policies for the Agency's contractors. Electronic access is available through the Internet or a dial-up modem bulletin board service (BBS). Agency contractors will be required to review the Internet or bulletin board when receiving a work request (i.e. delivery order or work assignment) to ascertain the applicable IRM policies. The intended effect of this proposed rule is to ensure that contractors perform IRM related work in accordance with current EPA policies.

DATES: Written comments shall be submitted not later than September 11, 1995.

ADDRESSES: Comments should be addressed to: Environmental Protection Agency, Office of Acquisition Management (3802F), 401 M Street SW., Washington, DC 20460, Attention: Edward N. Chambers.

FOR FURTHER INFORMATION CONTACT: Edward N. Chambers, telephone: (202) 260-6028.

SUPPLEMENTARY INFORMATION:

A. Background

The required EPA IRM policies are currently referenced in a clause contained in all Agency solicitations and contracts. While this clause provides for revised and new directives through attachments to contracts, because of the rapid changes in the IRM field EPA may still be at risk for requiring compliance with outdated directives. By locating the references and providing the full text of all required IRM policies on the Internet or the Agency's bulletin board service, EPA will be able to update this information as changes occur to ensure contractor compliance with current IRM policies. This effort to provide electronic access is consistent with the Federally mandated Government Information Locator Service (GILS), a key initiative of the National Performance Review (NPR).

B. Executive Order 12866

This is not a significant regulatory action under Executive Order 12866; therefore, no review is required by the Office of Information and Regulatory Affairs.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not contain information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.*

D. Regulatory Flexibility Act

The proposed rule is not expected to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, U.S.C. 601 *et seq.*

Internet and electronic bulletin boards are widely available information services, used commonly in the conduct of business by both small and large entities. Compliance with this requirement will require minimal cost or effort for any entity, large or small.

List of Subjects in 48 CFR Part 1552

Government Procurement, Specifications, Standards, and other Purchase Descriptions, Solicitation Provisions and Contract Clauses.

Dated: June 14, 1995.

Betty L. Bailey,

Director, Office of Acquisition Management.

For reasons set out in the preamble, chapter 15 of title 48 Code of Federal Regulations is proposed to be amended as set forth below:

1. The authority citation for 48 CFR part 1552 continues to read as follows:

Authority: Section 205(c), 63 Stat. 390, as amended, 40 U.S.C. 486(c).

2. Section 1552.210-79 is amended by revising the date in the clause heading and paragraphs (b), (c) and (d); and by removing paragraphs (e) and (f) to read as follows:

§ 1552.210-79 Compliance with EPA Policies for Information Resources Management.

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Compliance With EPA Policies for Information Resources Management (XXX-1995)

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(b) *General.* The contractor shall perform any IRM related work under this contract in accordance with the IRM policies, standards and procedures set forth in this clause and noted below. Upon receipt of a work request (i.e. delivery order or work assignment) the contractor shall check this listing of directives (See paragraph (d) for electronic access). The applicable directives for performance of the work request are those in effect on the date of issuance of the work request.

(1) *IRM Policies, Standards and Procedures.* The 2100 Series (2100-2199) of the Agency's Directives System contain the majority of the Agency's IRM policies, standards and procedures.

(2) *Groundwater Program IRM Requirement.* A contractor performing any work related to collecting groundwater data, or developing or enhancing data bases containing groundwater quality data, shall comply with *EPA Order 7500.1A—Minimum Set of Data Elements for Groundwater Quality.*

(3) *EPA Computing and Telecommunications Services.* The National

Data Processing Division (NDPD) Operational Directives Manual contains procedural information about the operation of the Agency's computing and telecommunications services. Contractors performing work for the Agency's National Computer Center or those who are developing systems which will be operating on the Agency's national platforms must comply with procedures established in the Manual.

(c) *Printed Documents.* Documents listed in paragraphs (b)(1) and (b)(2) above may be obtained from: U.S. Environmental Protection Agency, Office of Administration, Facilities Management and Services Division, Distribution Section, Mail Code: 3204, 401 M Street SW., Washington, D.C. 20460, Phone: (202) 260-5797.

(d) *Electronic Access.*

(1) *Internet.* A complete listing, including full text, of documents included in the 2100 Series of the Agency's Directives System as well as the two other EPA documents noted in this clause is maintained on the EPA Public Access Server on the Internet. The listing is located in the EPA policy section under IRM Policy, Standards and Guidance. The address is gopher.epa.gov.

(2) *Bulletin Board Notices.* All documents, including the listing, are available for browsing and electronic download through a dial-up modem bulletin board service (BBS). Dial (919) 558-0335 for access to the BBS. Set the communication parameters to 8 data bits, no parity, 1 stop bit (8,N,1) Full Duplex, and the emulator to VT-100. The information is the same whether accessed through the BBS or the Internet. For technical assistance, call 1-800-334-2405.

(End of Clause)

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DEPARTMENT OF DEFENSE

Defense Logistics Agency

48 CFR Parts 5446 and 5452

DLA Acquisition Regulation; Quality Assurance

AGENCY: Defense Logistics Agency, DOD.

ACTION: Proposed rule and request for comments.

SUMMARY: The Defense Logistics Agency proposes to add a new part to 48 CFR Chapter 54, the Defense Logistics Acquisition Regulation (DLAR) part 5446 and add coverage to 48 CFR Chapter 54, Part 5452. The proposed coverage implements a test under which a contractor will be required to replace, repair or provide reimbursements for items which do not conform with the specifications of the contract when such nonconformances are discovered within one year after Government acceptance. Comments are hereby requested on the proposed coverage.

DATES: Comments must be submitted on or before September 11, 1995, to be considered in the formulation of a final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Logistics Agency, Directorate of Procurement, AQLPC, ATTN: Mary Massaro, Room 4D175, Cameron Station, Alexandria, VA 22304-6100.

FOR FURTHER INFORMATION CONTACT: Mary Massaro, Defense Logistics Agency, AQLPC, (703) 274-6307.

SUPPLEMENTARY INFORMATION:

Background

From 1989 to 1993, the Office of the DoD Inspector General (DoDIG) conducted six audits dealing in some measure with the DoD product quality deficiency reporting (PQDR) program. The DoDIG has concluded that DoD does not have effective remedies to obtain reimbursement or replacement for major and critical nonconforming products. Current FAR coverage and clauses allow the Government to require contractor corrections of latent, but not patent, nonconformances discovered after acceptance of supplies delivered under fixed-price contracts. In order to correct this situation, the DoDIG has suggested certain regulatory and procedural changes regarding Government acceptance. The Director of Defense Procurement (USD(A&T)) has agreed to permit DLA to test changes to acceptance procedures in accordance with the DoDIG's general recommendations to determine whether such changes are effective, cost-beneficial, and capable of widespread implementation. The proposed rule presents such a mechanism: a clause, not unlike a warranty, which provides that, notwithstanding acceptance of items, the Government can require the contractor to remedy any nonconformance determined to have been contractor-caused. Such a nonconformance must have been discovered either via testing at a Government-designated laboratory or by a completed, validated product quality deficiency report investigation; even in the latter case, lab testing may be used, as appropriate, for validation purposes. Any Government action for recoupment must have been initiated within one year of the date of acceptance. The clause will be used by three of DLA's buying activities, the Defense Construction Supply Center (DCSC), the Defense Electronics Supply Center (DESC), and the Defense Industrial Supply Center (DISC). In the former two, the clause will be incorporated in contracting actions for the purchase of

supplies in certain federal supply classes (FSCs) that have yielded high or disproportionate rates of nonconformance in the recent past. At DISC, because of the wide variety and large numbers of individual items within FSCs, that Center will implement the test for selected national stock numbers (items) within two of the FSCs listed below, and for all the items within a third FSC. The FSCs to be included are:

DCSC-2520—Vehicular Power Transmission Components, 2815—Diesel Engines and Components, 4320—Power and Hand Pumps

DESC-5965—Headsets, Handsets, Microphones and Speakers

DISC-5307—Studs (all items), 5310—Nuts & Washers (Class 3 self-locking nuts IAW MIL-N-25027, only), 5340—Hardware, Misc. (zinc anodes only)

The proposed coverage will be included in the Defense Logistics Agency Acquisition Regulation (DLAR) 4105.1, which implements and supplements the Federal Acquisition Regulation (FAR), the Defense Federal Acquisition Regulation Supplement (DFARS), and other DOD publications and, pursuant to FAR 1.304, establishes DLA procedures relating to the acquisition of supplies and services under the authority of 10 U.S.C. 301. This supplementary coverage and clause are designed to give contracting officers an effective tool for dealing with contractor-caused patent nonconformances.

Regulatory Flexibility Act

The proposed additions to 48 CFR parts 5446 and 5452 may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because they provide a means of recoupment for patently defective items when these nonconformances are discovered after Government acceptance. This remedy is provided against both small and large entities under the proposed rule. An Initial Regulatory Flexibility Analysis has been prepared and is summarized as follows:

A limited number of procurements was selected for the test to provide valid test results while minimizing the impact on industry.

Eliminating small business from the test would invalidate the test results. Most DLA contractors are small businesses.

The proposed coverage at 48 CFR parts 5446 and 5452 is required in order to provide DLA with a means of recoupment for patently defective items

when these nonconformances are discovered after Government acceptance. The proposed rule will apply to all businesses, large and small, that enter into contracts with DLA field activities for the covered FSCs/items. Although the rule will apply to all and cannot be waived or relaxed for small entities, it will only have an adverse impact on those contractors that provide items with patent nonconformances. The proposed rule does not contain any information collection and recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501, *et seq.* Costs of compliance are dependent upon numbers of nonconforming items/lots delivered within the affected FSCs, and cannot be estimated at the present time. There are no alternatives to the proposed rule that will accomplish the stated objectives.

A copy of the Initial Regulatory Flexibility Analysis has been submitted to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the individual listed above. Comments from small entities concerning the affected DLAR Subparts will be considered in accordance with Section 610 of the Act.

Paperwork Reduction Act

The proposed rule does not impose any reporting or recordkeeping requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.* and, therefore, the Paperwork Reduction Act does not apply.

Public Participation

Public participation in the rulemaking will be handled by means of the Defense Logistics Agency's consideration of written comments mailed to the address set forth above.

Government procurement.

List of Subjects in 48 CFR Parts 5446 and 5452

Therefore, it is proposed that 48 CFR chapter 54 be amended as follows:

1. Part 5446 is added to read as follows:

PART 5446—QUALITY ASSURANCE

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, 48 CFR Part 1, subpart 1.3 and 48 CFR part 201 subpart 201.3

5446.393 Remedies for post-acceptance discovery of nonconformance.

The contracting officer shall insert the clause at 5452.246-9005, Remedies for Post-Acceptance Discovery of Nonconformances (Test), in solicitations and contracts in accordance with 5446.590.

§ 5446.590 Post-acceptance discovery of defects (test).

(a) The purpose of this test is to determine the viability of contract coverage which provides remedies to the Government for patent defects discovered after acceptance. Specific procedures are set forth in the test plan. The test will apply to designated FSCs or items at DCSC, DESC, and DISC for which these Centers have experienced unusually high levels of nonconformances, as evidenced by PQDR data from the System for Analysis of Laboratory Testing (SALT) data base. The DLA laboratory testing program and/or completed, validated PQDR investigations will be used to uncover nonconformances and to support determinations of contractor causation. The clause at 5452.246-9005, Remedies for the Post-Acceptance Discovery of Nonconformances (Test), will be used in contracts for the covered FSCs/items to provide remedies for those nonconformances.

(b) The clause at 5452.246.9005 gives the Government the means to pursue repair, replacement or recoupment, at Government option, for a period of one year after the cognizant Government representative signifies acceptance by signature on the DD250 or similar documentation. These remedies also apply to replacements for up to one year after their acceptance. Remedies provided under this clause do not preclude the use of the nonconformance against the contractor in future sources selection decisions. After one year from the acceptance date, acceptance shall be conclusive in accordance with the FAR standard inspection clauses (e.g., paragraph (k) of FAR 52.246-2, which states that acceptance shall be conclusive except for latent defects, fraud, and the like). Future discoveries of patent defects (after the twelve-month period has ended) are subject to voluntary recoupment procedures.

(c) Receipts of the designated items will be targeted (identified/segregated) upon their delivery to a depot. Not all items or all lots in the designated FSCs will be subject to lab testing. However, in the event of a lab test failure, lab personnel will report their results to the ICP; the contracting officer will be notified through the Center Quality element. The contracting officer shall pursue remedies available under the clause at 5452.246-9005 when the nonconformance can be traced to a specific contract and is contractor-caused.

(d) Even for those nonconformances not originally uncovered via random laboratory testing, labs may be used as necessary to validate the existence of

the patent defects. Positive lab test results shall not prohibit the Government's pursuit of remedies for nonconformances subsequently identified by depot personnel, end-users, or others (whether or not confirmed by lab testing) within the twelve months after acceptance. As stated in paragraph (b) of this section after the one-year period has passed, any discovery of patent defects in these items shall be handled in accordance with voluntary recoupment procedures.

(e) Like warranties, the clause requires that the items or packages be marked with notice of coverage, and contractor-prepared shipping documents must also carry notice of the clause's applicability to the shipped items.

(f) During the test period, the contracting officer shall include the clause at 5452.246-9005, Remedies for Post-Acceptance Discovery of Nonconformances (Test), in all non-SASPS-I contracting actions for the covered FSCs/items, except where the contracting officer determines that the cost for inclusion of the clause is unreasonable. The cost reasonableness will be based on evaluation of the contractor's stated prices for the item with and without clause inclusion. (The latter is to be expressed via "additive CLIN.") A determination that the cost is unreasonable must be approved at a level above the contracting officer and documented in the contract file. Since the purpose of the test is to determine the viability of the clause, such determinations must not be used customarily.

(g) Contracting officers shall maintain a separate log, in the same fashion and containing the same data fields as the Warranty Log, for all items covered by the Remedies for Post-Acceptance Discovery of Nonconformances (Test) clause. The log must distinguish between patent and latent defects.

PART 5452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5452.246-9005 [Added]

2. The authority citation for part 5452 continues to read as follows:

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, 48 CFR part 1, subpart 1.3 and 48 CFR part 201, subpart 201.3.

3. Part 5452, subpart 5452.2, is amended by adding section 5452.246-9005 to read as follows:

§ 5452.246-9005 Remedies for Post-Acceptance Discovery of Nonconformance (test).

As prescribed in 5446.590, insert the following clause in contracts for designated FSCs or items at DCSC, DESC, and DISC to provide remedies for nonconformances.

5452.246-9005—Remedies for Post-Acceptance Discovery of Nonconformances (Test) (June 1995) (DLAR)

(a) **Definitions.** (1) **Acceptance:** The word acceptance as used herein means the execution of the acceptance block and signing of a DD Form 250 (or similar documentation) by the authorized Government representative.

(2) **Supplies:** The word supplies as used herein means the end-item furnished by the contractor and any related services required under this contract. The word does not include technical data.

(b) **Purpose and scope.** Notwithstanding Government inspection and acceptance in accordance with any of the standard inspection clauses of supplies furnished under this contract, or any other term or condition of the contract concerning the conclusiveness thereof, and notwithstanding that the contractor may already have been paid for contractual performance and the contract otherwise closed, such acceptance shall not be considered final for a period of one year after the date that a cognizant Government representative signifies acceptance by signature on the DD Form 250 or similar documentation. Upon discovery during the one-year period of any nonconforming supplies delivered under this contract, acceptance may be rescinded in accordance with the terms set forth below. After one year, the terms of the standard inspection clause concerning the conclusiveness of acceptance shall apply.

(c) **Contractor's obligations.** (1) As stated above, notwithstanding Government acceptance, the contractor agrees that at the time of delivery of each item, lot, or shipment, and continuing for a period of one year following acceptance:

(i) All supplies delivered under this contract shall be free from defects in material and workmanship (and design, if it is the contractor's, rather than the Government's, design that shall be used), and shall conform with all requirements of this contract;

(ii) The preservation, packaging, packing and marking, and the preparation for, and method of, shipment of all end-items shall conform with the requirements of this contract; and

(iii) All nonconformances discovered by the Government during the one-year period after acceptance that are determined/ adjudged not to be the fault of the Government shall subject the contractor to the remedies set forth in (e), below.

(2) All items delivered under this contract may be subject to post-acceptance laboratory testing by a Government-designated laboratory in accordance with applicable sampling plans set forth elsewhere in this contract. If either such testing or a completed, validated product quality deficiency report investigation uncovers or

confirms contractor-caused nonconformances, acceptance of the items, or the lots or shipments of which they are representative, shall be rescinded, and the contractor shall be obligated to provide such remedies to the Government as are set forth in (e), below.

(3) The contractor shall make note of the existence of this clause, and all rights and remedies afforded to the Government thereby, on all shipping documents for items delivered under this contract.

(4) The contractor shall be expected to quote two separate prices for the supplies furnished under this contract: one for the items without reference to this coverage, and another reflecting the price increase (if any) that is a consequence of this clause's inclusion.

(d) *Notification.* The contracting officer shall give written notification to the contractor of any nonconformance within one year after delivery of the nonconforming items.

(e) *Remedies.* With respect to each item or lot in which a nonconformance is discovered and confirmed, the contracting officer shall require the prompt repair or replacement of the item or lot. If this remedy is impractical under the particular circumstances, the contracting officer shall retain the item or lot and require, in lieu of repair or replacement, monetary restitution in the form of a decrease in contract price on any remaining open contract(s) with the contractor, or refund of the price of the nonconforming items or lots, at the election of the contracting officer.

(f) *Transportation costs.* The contractor shall bear the cost of transportation of items for return, replacement, or correction from the place of delivery specified in the contract

to the contractor's plant. Any additional transportation costs (e.g., shipment from other than the original delivery site) shall be borne by the Government. Responsibility for supplies while in transit remains with the contractor.

(g) *Contractor's failure to remedy.* The contracting officer may, by contract or otherwise, correct or replace the nonconforming supplies with similar supplies and charge to the contractor the cost occasioned thereby if the contractor: (1) fails to make redelivery of the corrected or replaced supplies within the time established for their return; or (2) fails either to accept return of the nonconforming supplies or fails to make progress after their return; or (3) fails to make restitution for same.

(h) *Timeframe for correction, repair, replacement, or reimbursement.* Unless otherwise set forth in this contract, the contractor shall have 90 days from the date of notification of the defect or return of the items/lots, whichever is later, within which to effect the required restitution.

(i) *Continuing liability.* Any supplies or parts thereof, corrected or furnished in replacement under this clause, shall also be subject to the terms of this clause to the same extent as supplies initially delivered. The period during which the Government can require correction of these defective replacements shall also be one year from the date of delivery thereof.

(j) *Government property.* Items accepted by the Government and subsequently returned to the contractor under the terms of this clause remain the property of the Government. Disposal and replacement of these items are subject to the terms and

conditions of the Government property clause(s) set forth elsewhere in this contract.

(k) *Disposition instructions from contractor.* When the Government elects the equitable adjustment remedy, in lieu of correction or replacement, the contractor shall provide disposition instructions for the nonconforming items within 60 days of notification thereof.

(l) *Contract closeout.* Notwithstanding the contract closeout timeframes established for contracts of this type, and notwithstanding the fact that final payment has already been effected, this contract shall remain open solely for purposes of enforcement of this clause for one year subsequent to Government acceptance of the items, lots, or shipments delivered under this contract.

(m) *Rights and remedies: scope.* The rights and remedies of the Government provided in this clause are in addition to and do not limit any rights afforded to the Government by any other clause of this contract.

(n) *Price consequences.* As stated in (c)(4), above, you must indicate the amount, if any, by which the item price you have quoted is affected by, or raised in response to, inclusion of this clause. You should express any such change by means of a second quoted price for the items that takes this coverage into account.

[End of clause]

Dated: June 30, 1995.

Margaret J. Janes,

Assistant Executive Director (Procurement Policy).

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